

VOON CHI ZEN

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v.

SOO WAI YEE

HIGH COURT SABAH & SARAWAK, KUCHING

B

RAVINTHRAN PARAMAGURU JC

[CASE NO: KCH-33-243-2011]

26 JULY 2012

CIVIL PROCEDURE: *Pleadings - Amendment - Application to amend answer to petition for dissolution of marriage - Whether a co-respondent could be added in amended or supplemental petition - Whether respondent could amend pleadings - Divorce and Matrimonial Proceedings Rules 1980, rr. 15, 22 - Whether application should be allowed*

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FAMILY LAW: *Dissolution of marriage - Petition for - Amendment to answer to petition - Whether respondent could add a co-respondent - Whether adultery may be averred in petition and in answer to petition - Law Reform (Marriage and Divorce) Act 1976, s. 58 - Whether respondent in divorce proceeding equally entitled to plead adultery and seek relief - Whether application should be allowed*

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The petitioner in this divorce petition was the husband while the wife was the respondent. The petitioner averred numerous instances of alleged unreasonable behaviour on the part of the respondent and that the marriage had broken down irretrievably as a result. The petition was filed on 15 July 2011. Subsequently, the answer to the petition was filed on 2 September 2011. The instant application by the wife was to amend the answer to the petition to aver that one Tan Siew Choo had been carrying on an adulterous relationship with the petitioner. In this same application the respondent also applied to add the said Tan Siew Choo as a co-respondent. The petitioner objected to the application. According to the petitioner, under O. 15 of the Rules of the High Court 1980 ('RHC'), there was no rule under which a respondent could add a co-respondent. The issues that arose were (i) whether the respondent could add a co-respondent; (ii) whether amendments could be made to the answer; and (iii) whether the application should be allowed.

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A Held (allowing the application):

- B** (1) The respondent did not ground her application under O. 15 of the RHC only, but also under rr. 11, 15 and 22 of the Divorce and Matrimonial Proceedings Rules 1980. Further, on a careful reading of s. 58 of the Law Reform (Marriage and Divorce) Act 1976, adultery may not only be averred in the petition but also in the answer. As the answer to a petition is filed by a respondent, it follows that the respondent is permitted by s. 58 to add the alleged adulterer or adulteress as a co-respondent. A combined reading of ss. 54, 58 and 60 is capable of one meaning only ie that a respondent in a divorce proceeding is equally entitled to plead adultery and seek relief. (paras 5 & 7)
- C**
- D** (2) Rules 15 of the Divorce and Matrimonial Proceedings Rules 1980 gives power to the court to allow amendment of a petition, and also envisages that a co-respondent could be added in an amended or supplemental petition. Rule 22 of the Divorce and Matrimonial Proceedings Rules 1980 also grants the same indulgence to a respondent to amend his pleadings. (paras 8 & 9)
- E**
- F** (3) Law Reform (Marriage and Divorce) Act 1976 preserves the olden day 'fault' principle in ss. 54 and 58 by allowing parties to allege adultery as a cause of breakdown of a marriage. As for the bona fides of the application, this court could not discern anything in the affidavits to suggest that it was otherwise. By this amendment, the respondent had averred that the petitioner had carried on a relationship with the co-respondent. A finding of fact on this issue could only be made during a full trial. The respondent should, therefore, be allowed to have her day in court in respect of the veracity of the adultery allegations. (para 12)
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H *[Trial of matter delayed due to the belated application of respondent, therefore, respondent to bear the costs of this application and pay RM2,500 to the petitioner.]*

Case(s) referred to:

- I** *Chong Tai Loe v. Karen Won Wai Han [2004] 2 CLJ 383 HC (refd)*
Ho Ching Choo lwn. Ng Kian Beng [2011] 1 LNS 567 HC (refd)
Yamaha Motor Co Ltd v. Yamaha (M) Sdn Bhd & Ors [1983] 1 CLJ 191; [1983] CLJ (Rep) 428 FC (refd)

Legislation referred to:

Divorce and Matrimonial Proceedings Rules 1980, rr. 8, 11, 15, 22
Law Reform (Marriage and Divorce) Act 1976, ss. 54, 58(1), 60
Rules of the High Court 1980, O. 15 r. 4

For the husband petitioner - SY Chan; M/s Ee & Lim Advocs

For the wife respondent - Norman Liew Hock Zee; M/s Chong Brothers Advocs

Reported by Suhainah Wahiduddin

JUDGMENT**Ravinthran Paramaguru JC:**

[1] This is an application to add a co-respondent and to amend the answer to the petition. The application, though not unprecedented, is unusual as it is not the petitioner who seeks to add a co-respondent. It is the respondent who has applied to add a third party as a co-respondent.

[2] The brief facts are as follows. The petitioner is the husband whereas the wife is the respondent. The petitioner averred numerous instances of alleged unreasonable behaviour on the part of the respondent. I find it unnecessary to refer to the allegations for the purpose of this application. However, the petitioner averred that the marriage had broken down irretrievably as a result. The petition was filed on 15 July 2011. The answer to the petition was filed on 2 September 2011. The instant application by the wife is to amend the answer to the petition to aver that one Tan Siew Choo had been carrying on an adulterous relationship with the petitioner. In this same application, the respondent has applied to add the said Tan Siew Choo as a co-respondent. The petitioner has objected to the application.

Issues

Whether The Respondent Can Add A Co-respondent?

[3] The application of the respondent is grounded under O. 15 of the Rules of the High Court 1980 and rr. 11, 15, 22 of the Divorce and Matrimonial Proceedings Rules 1980. Counsel for the petitioner submitted at length that under O. 15 of the Rules of the High Court 1980, there is no rule under which a respondent

A can add a co-respondent who has not made the application himself or herself. I reproduce her concluding argument on this point below:

B It is the Petitioner's submission that the Respondent's application under Order 15 r. 4 and r. 6 are inappropriate. If the Respondent has any right at all to join Ms Tan as a party to the present action, the application would have to be made by way of a third party action pursuant to Order 16 of the RHC, in which case, Ms Tan would have to be served with the application and would have the opportunity to be heard in order for the court to fairly decide whether it is appropriate to join her a third party in the action.

D [4] Counsel for the petitioner may well be right in her argument that in this peculiar situation where a respondent wants to add a third party as co-respondent in a matrimonial matter, the application cannot fall under O. 15 r. 4 or r. 6. However, the respondent did not ground her application under O. 15 only but also under rr. 11, 15, 22 of the Divorce and Matrimonial Proceedings Rules 1980. During argument, counsel for the respondent also cited s. 58 of the Law Reform (Marriage and Divorce) Act 1976 to support his argument that a respondent can add a third party who is the alleged adulteress as a co-respondent. Section 58(1) reads as follows:

F **58. Damages for adultery may be claimed against co-respondent.**

G (1) On a petition for divorce in which adultery is alleged, **or in the answer of a party to the marriage praying for divorce and alleging adultery**, the party shall make the alleged adulterer or adulteress a co-respondent, unless excused by the court on special grounds from doing so. (emphasis added)

H [5] On a careful reading of s. 58, it will be observed that adultery may not only be averred in the petition but also in the answer. As the answer to a petition is filed by a respondent, it follows that the respondent is permitted by s. 58 to add the alleged adulterer or adulteress as a co-respondent. In the unreported case of *Ho Ching Choo lwn. Ng Kian Beng* [2011] 1 LNS 567 which was cited by counsel for the respondent, the court allowed an application by the husband-respondent to add the alleged paramour of the petitioner-wife as a co-respondent

under s. 58. It was pointed out in that case that s. 60 of the Law Reform (Marriage and Divorce) Act 1976 supports the view that a respondent can add a co-respondent on the ground of alleged adultery. Section 60 reads as follows:

60. Hearing, of petition.

If in any proceedings for divorce the respondent alleges against the petitioner and proves any such fact as is mentioned in section 54 the court may give the respondent the relief to which the respondent would have been entitled if the respondent had presented a petition seeking that relief.

[6] Section 54 states that the court shall have regard to a number of facts in its inquiry into the circumstances leading to the breakdown of the marriage. One of the facts listed in s. 54 is as follows:

(a) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;

[7] A combined reading of ss. 58, 60 and 54 is capable of one meaning only, ie, that a respondent in divorce proceedings is equally entitled to plead adultery and seek relief. For this reason, the respondent need not ground his application under O. 15 as he or she is permitted to do so by the Law Reform (Marriage and Divorce) Act 1976. If it were otherwise, I would observe that a respondent who has been served a divorce petition by the unfaithful spouse would be without any remedy insofar as the grievance occasioned by adultery is concerned. This is because, the respondent cannot seek damages for adultery in an independent action outside of matrimonial proceedings (see *Chong Tai Loe v. Karen Won Wai Han* [2004] 2 CLJ 383).

Whether Amendment Could Be Made To The Answer?

[8] This question can be answered by referring to rr. 15 and 22 of the Divorce and Matrimonial Proceedings Rules 1980. Rule 15 gives power to the court to allow amendment of a petition. Rule 15 also envisages that a co-respondent could be added in an amended or supplemental petition as sub-rule 8 reads as follows:

- A (8) Unless otherwise directed, a copy of a supplemental or amended petition, together with a copy of the order (if any) made under this Rule shall be served on every respondent and co-respondent named in the original petition or in the supplemental or amended petition.
- B [9] Rule 22 reads as follows:
22. Supplemental answer and amendment of pleadings.
- C Rule 15 shall apply with necessary modifications to the filing of a supplemental answer, and the amendment of a pleading or other document not being a petition, as they apply to the filing of a supplemental petition and the amendment of a petition.
- [10] Thus, r. 22 grants the same indulgence to a respondent to amend his pleadings.
- D *Whether Application Should Be Granted?*
- [11] The general principles applicable to an amendment application are as stated in the well-known case of *Yamaha Motor Co Ltd v. Yamaha (M) Sdn Bhd & Ors* [1983] 1 CLJ 191; [1983] CLJ (Rep) 428. The relevant questions are:
- E (i) whether the application is *bona fide*;
- (ii) whether the prejudice caused to the other side can be compensated by costs;
- F (iii) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character.
- G [12] Question (iii) should be clearly answered in the negative as the allegation of adultery cannot be said to be inconsistent with the character of matrimonial proceedings. Law Reform (Marriage and Divorce) Act 1976 preserves the olden day “fault” principle in ss. 54 and 58 by allowing parties to allege adultery as a cause of breakdown of a marriage. As for the *bona fides* of the application, I cannot discern anything in the affidavits to suggest that it is otherwise. The respondent has deposed that it had come to her knowledge only recently that the petitioner had carried on an affair with the proposed co-respondent. Counsel for the petitioner argued that if the allegation was *bona fide* and true, it should have been made in the original answer. In my opinion, this argument may not be relevant as the very purpose of the
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amendment procedure is to enable parties to rectify omissions. For that reason, it is irrelevant that the pleading was not properly done earlier, unless of course, there is evidence to suggest *mala fides* on the applicant's part. As for the prejudice, the scheduled trial has been delayed because of this application. However, it is not apparent if there is any other prejudice that cannot be compensated by a suitable costs order. Lastly, counsel for petitioner has submitted that the amendment would be useless because the pleadings and affidavits make it plain that the breakdown of the marriage occurred before is April 2010 and that the petitioner is alleged to have carried on his affair with the proposed co-respondent after that date only. I have read the answer and the proposed amendment. In the proposed para. 32 of the answer, it is averred as follows:

32. In or 2010 before and onwards, the respondent says that the Petitioner committed adultery with the Co-Respondent who is a married woman by the name of Tan Stew Choo (WN. KP. 760807-13-5590).

[13] Therefore, by this amendment, the respondent has averred that the petitioner has carried on a relationship with the co-respondent before or after 2010. Thus there is no admission that the affair took place only after the breakdown of marriage. A finding of fact on this issue can only be made during a full trial. The respondent should, therefore, be allowed to have her day in the court in respect of the veracity of the adultery allegations.

[14] The other proposed amendments are in respect of the address of the matrimonial home and the income of the petitioner. During oral argument, no objections were raised in respect of these amendments. Even if it were otherwise, I would rule that these proposed amendments are quite proper as no prejudice is occasioned to the petitioner.

[15] I shall, therefore, allow the application and grant order in terms of prayers (a), (b) and (c). Lastly, I note that the trial of this matter was delayed because of the belated application of the respondent. I shall, therefore, order the respondent to bear the costs of this application and pay the sum of RM2,500 as costs to the petitioner which is to be paid forthwith. I also order that the cause papers must be served on the co-respondent within 14 days. I fix for further case management on 27 August 2012 at 8.45am.